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No. 95-1223

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

A.A. & M. CARTING SERVICE, INC.; FARMINGDALE CARTING, INC.; NATALE PEPE WASTE CORP.; PGS CARTING CO., INC.; JOSEPH S. CELANO; MARIANNE CELANO; JC INDUSTRIES, INC.; C.B.S. RUBBISH CO., INC.; FARMINGDALE INDUSTRIAL PARK ASSOCIATION; MINERSFUEL COMPANY, INC.; and RESOURCES CONSERVATION CORP.,
Petitioners,

v.

TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as COMMERCIAL WASTE COLLECTING AND RECYCLING DISTRICT; TOWN BOARD OF THE TOWN OF BABYLON; RICHARD H. SCHAFFER; and BABYLON SOURCE SEPARATION COMMERCIAL, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the establishment of a commercial garbage district by a municipality utilizing its taxing and bonding authority is consistent with the holding of this Court in *C & A Carbone v. Town of Clarkstown*?

2. Whether the establishment of a commercial garbage district by a municipality discriminates against out-of-state interests on interstate commerce where both the collection and disposal contractors are selected through open, public competitive bidding which involved aggressive solicitation of bidders nationally?

3. Whether a municipality which unilaterally provides collection and disposal of commercial municipal solid waste to everyone in its Commercial Garbage District is a market participant?

4. Whether the district court's finding that petitioners, if successful, could be compensated by monetary damages and therefore failed to establish irreparable harm, precludes injunctive relief?

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BRIEF IN OPPOSITION

JURISDICTION

Petitioners' jurisdictional statement is complete and correct.

STATEMENT OF THE CASE

Respondent incorporates by reference the Statement of Facts in the opinion below. *A.A. & M. Carting Service,*

Inc., et al. v. Town of Babylon, et al., 66 F.3d 1272, 1276-80 (2d Cir. 1995), attached to Petitioners' Appendix ("Pet. App.") at 1a-46a.

REASONS FOR DENYING THE WRIT

Contrary to petitioners' exhortations, there is no divergence between this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) and the holding by the Second Circuit in the case at bar. For most of this century the paramount role of local government to control garbage collection and disposal has been recognized by this Court. The record here and the opinion of the Second Circuit in this case demonstrate clearly that the respondent Town of Babylon properly utilized traditional municipal police power to create a commercial garbage district in a manner consistent with the principles of this Court with respect to the dormant interstate Commerce Clause and the market participant doctrine.

I. THERE IS NO NEED FOR THIS COURT TO RE-ADDRESS THE "ROADMAP" ARTICULATED IN *CARBONE*

Less than two years ago this Court decided *C & A Carbone, Inc. v. Town of Clarktown*, 114 S. Ct. 1677 (1994), which held that a local ordinance violated the dormant Commerce Clause where it mandated that delivery of all solid waste within the Town be processed at a local, private transfer station. The instant case is not worthy of this Court's review because the respondent Town has followed the roadmap laid out by this Court in *Carbone*. *Id.* at 1684.

In *Carbone*, the Town of Clarkstown argued, *inter alia*, "that special financing is necessary to ensure the long-term survival of the designated facility." *Id.* In answer to this contention, this Court stated, "[i]f so, the town may subsidize the facility through general taxes or municipal bonds." *Id.* (citations omitted).

In the case at bar, the Second Circuit recognized that the respondent Town of Babylon had taken to heart this Court's admonition in *Carbone*, emphasizing that "Babylon has employed both taxes and bonds." 66 F.3d at 1292. Accordingly, petitioners' characterization that this case is an example of a locality seeking to evade this Court's decision in *Carbone*, could not be further from reality. In this case, the Second Circuit unanimously ruled that the commercial garbage district established by the Town of Babylon satisfied the teachings of this Court in *Carbone*.

A. Municipal Responsibility for Garbage Collection and Disposal

Ninety-one years ago this Court settled the question of whether garbage collection and disposal is a core function of local government in the United States. *See California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905). Petitioners misstate the law by suggesting that in *Carbone* this Court invalidated this venerable precedent *sub silentio* and articulated some new precept of interstate commerce jurisprudence. The Second Circuit in its opinion here, quoted Chief Justice Marshall who wrote, "an opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established." 66 F.3d at 1294, quoting *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693)).

The approaches employed by municipalities in their efforts to manage effectively their waste vary tremendously, running the gamut from completely private [1], to contrac-

[1] One study estimated that seventy-one percent of the local governments in the United States rely on the private sector in one form or another for garbage collection. REASON FOUNDATION, PRIVATIZATION, 1993: 17th ANNUAL REPORT ON PRIVATIZATION 6,

tual licensing [2] or franchise arrangements [3], to exclusively municipal collection and disposal [4]. There are a myriad of hybrids and combinations of these approaches, as well as a variety of governmental forms to implement them. Petitioners' contention that a review of Babylon's unique

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17-18 (1993). For instance, the Government Accounting Office recently reported that in certain areas of Colorado and New Jersey, homeowners have no alternative but to contract with commercial collection firms because local municipalities do not provide or arrange for collection services. RESOURCES, COMMUNITY, AND ECONOMIC DEV. DIV., GOVERNMENT ACCOUNTING OFFICE, REPORT No. GAO/RCED-95-3, SOLID WASTE—STATE AND FEDERAL EFFORTS TO MANAGE NONHAZARDOUS WASTE 12 (1995).

[2] A recent survey found that thirty-six percent of cities and counties contract out to private entities for garbage collection. U.S. DEP'T OF HOUSING AND URBAN DEV., REDISCOVERING URBAN AMERICA 6-9 (Jack Sommer and Donald A. Hicks eds., 1993).

[3] For instance, California is a state that relies heavily on franchising solid waste collection services. The ability of local governments in California to grant franchises for solid waste collection is derived from a state statute. *See* Cal. Pub. Res. Code 40059(a)(2) (1986 & Supp. 1995) (authorizing local governments to provide waste collection services by means of, among other methods, "partially exclusive or wholly exclusive franchise"). Local governments have seized upon this grant of discretion to mandate that solid waste be collected by franchised haulers. *See, e.g.*, Orange County Code 4-3-56 (mandating that solid waste in unincorporated areas of the county be collected by franchised haulers on an exclusive basis).

[4] As the Court of Appeals for the Sixth Circuit noted, "[c]ourts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors." *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir.1981), *vacated on other grounds*, 455 U.S. 931 (1982). In fact, legal authority for exclusive municipal collection of solid waste can be found in almost every state. *See, e.g.*, Alaska Stat. 29.35.050(3) (1995); *United States Disposal Sys., Inc. v. City of Northglenn*, 567 P.2d 365 (Colo. 1977); *Yohe v. City of Lower Burrell*, 208 A.2d 847 (Pa. 1965); *Cassidy v. City of Bowling Green*, 368 S.W.2d 318 (Ky. 1963); *City of Rochester v. Gutberlett*, 105 N.E. 548 (N.Y. 1914).

system will have national repercussions is misplaced. Given the variety of existing waste management efforts, consideration by this Court of Babylon's system will be of limited precedential value.

Petitioners take liberty with the facts in an attempt to align this case with others before this Court. Notably, this Court denied *certiorari* in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, —— U.S. —— (February 20, 1996). This denial occurred after the petition at bar was filed and before Babylon's opposition was due. Suffice it to say that Babylon's commercial garbage district does not place an impermissible burden on interstate commerce because the taxpayers rather than the garbage haulers pay for collection and disposal directly in their tax bill [5] and there was competitive bidding for collection and for disposal which were open to in-state and out-of-state entities on an equal basis.

B. Consistency Among Circuits

Although petitioners argue that *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3rd Cir. 1995), petition for *certiorari* filed January 16, 1996, decided by the Third Circuit, is representative of efforts elsewhere to evade *Carbone*, they disregard the threshold issue in any matter involving an alleged violation of the dormant interstate Commerce Clause. *Carbone*, 114 S. Ct. at 1682. Does the challenged measure discriminate against interstate commerce? Here, petitioners never squarely articulate the nature of the discrimination they claim to have suffered. This failure is fatal to their claim and to their application for review.

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[5] In their zeal to claim an interstate commerce clause violation, petitioners neglect to mention that Babylon's Code specifically gives petitioners the right to collect recyclables; they are just barred from a license to collect solid waste in the District. Babylon Town Code § 133-21.

Contrary to petitioners' contention that the Second Circuit here and Third Circuit in *Harvey* are condoning practices in derogation of this Court's opinion in *Carbone*, both Circuits have assiduously adhered to the principles articulated in *Carbone* and other dormant interstate Commerce Clause cases decided by this Court. Both the Second and Third Circuits focussed on whether there had been a favoring of in-staters to the disadvantage of out-of-staters.

In *Harvey*, the Third Circuit properly began its analysis by identifying the values that the interstate Commerce Clause was designed to protect. 68 F.3d at 797. As this Court has noted, the first step involved determining whether there has been discrimination against interstate commerce, to wit, the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Environmental Quality of Oregon*, 114 S. Ct. 1345, 1350 (1994). In *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994), economic protectionism is defined as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 2211 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988)).

If there is a finding of discrimination, the Courts will apply the strict scrutiny test, *Taylor v. Maine*, 477 U.S. 131 (1986). If there is a finding that the measure is nondiscriminatory or evenhanded, the Courts will apply the *Pike* balancing test. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

The Third Circuit in *Harvey* accordingly analyzed the systems challenged there to ascertain whether there was discrimination against interstate commerce by favoring in-state interests or disadvantaging out-of-state interests. In making this evaluation, the Third Circuit examined the designation process to ascertain whether or not out-

of-staters in practice enjoyed equal access to the local market. 68 F.3d at 805-06, 808. The Third Circuit concluded that a municipality could choose a single provider, without violating the interstate Commerce Clause, "so long as the selection process was open and competitive and offered truly equal opportunities to in-state and out-of-state businesses." *Id.* at 798.

Petitioners call the Third Circuit's approach: "a crabbed interpretation of *Carbone*." Petition at 13. However, petitioners never address the fact that they participated in an open and competitive process on an equal basis with other in-state and out-of-state companies. Here, the Second Circuit noted that the Town conducted an open bidding process and "aggressively solicited proposers from a national audience". 66 F.3d at 1290. To the extent that arguments were made by plaintiffs in the related case of *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1288-90 (2d Cir. 1995), that the bidding process skewed selection in favor of the successful bidder, the Second Circuit rejected these claims as inconsequential. "Despite the plaintiffs' protestations to the contrary, none of these factors detracted from the nondiscriminatory nature of the Town's bidding process, or resulted in any undue burdens on interstate commerce." *Id.* at 1290.

Significantly, petitioners neglect to mention that they participated in the 1994 public bidding process seeking award of the contract to provide garbage collection services. Petitioners also neglect to mention that their unsuccessful bid was $4.5 million higher annually than the successful bid. Petitioners omit mention of the procedure mandated by General Municipal Law § 120-w by which more than 19 bid packages were distributed as a result of at least three publications of Requests for Proposals in national trade journals. *See* Respondents' Appendix A. These omissions demonstrate the absence of any differential treatment to the disadvantage of out-of-staters.[6]

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[6] The case at bar is distinct from all the other garbage cases claiming a violation of the dormant commerce clause, because

Indeed, there has been consistency among the Circuits that have addressed this issue. In addition to the Third Circuit and Second Circuit, the Tenth Circuit has applied a similar analysis. *See Blue Circle Cement v. Board of County Commissioners*, 27 F.3d 1499, 1512 (10th Cir. 1994). The Third Circuit also applied this reasoning in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995) and held that New Jersey's designation process favored in-state facilities and therefore did not provide a "level playing field". *Id.* at 713.

Thus, neither the Second Circuit here, nor the Third Circuit in *Harvey*, departed from the principles articulated by this Court. Petitioners at bar bemoan the focus on the bidding process without identifying the manner in which there has been a benefit to in-state interests to the detriment of out-of-state interests. Petitioners' sour grapes are perhaps understandable given their unsuccessful bid. Nevertheless, one who competes on a level playing field and loses should not gain the attention of this Court.

C. Mischaracterizations and Deft Omissions

Petitioners try to contort the nature of this case by mischaracterization and deft omission. Despite the clear language of the contract between the Town and its contractor which makes disposal at the Town recovery facility permissive, not mandatory, petitioners try to create a misimpression by quoting another contractual provision

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the allegedly-burdened party, BSSCI, is not challenging the ordinance or contract. Here, only BSSCI is subject to the "irresistible incentive" to dispose of the garbage it collects at the Babylon incinerator. There is a serious question as to whether these unsuccessful bidders have the appropriate legal status to attack a contract they haven't signed. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) ("When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else* . . . standing . . . is 'substantially more difficult to establish.'") (citations omitted).

out of context. Pet. App. at 103a. Specifically, petitioners point to Article 18 of the contract in a manner which is made to appear that Babylon retains the right to direct the contractor to dispose of the waste only where the Town directs. Petition at 6; Pet. App. at 104a. Petitioners neglect to advise the Court that this provision is designed to operate in the hypothetical eventuality that the Town's incinerator is out of service. This is apparent from that provision's requirement that where the Town chooses to change the location of disposal, "the Town will pay the disposal fee." Pet. App. at 104a. Only then does the Town retain the right to direct where the waste will be deposited; it should be noted that the definition of Disposal Site contains no geographic limitations whatsoever. *See* Respondents' Appendix B. Furthermore, the eventuality of the Town changing the Disposal Site did not occur in this case and petitioners unfairly criticize the Second Circuit for "brush[ing] aside the contractual provision giving Babylon the right to direct the licensee to take the waste to a specified site". Petition at 6. Since that provision had limited applicability and was not exercised here, petitioners' reliance on it reflects a wane attempt [7] to bring this case within the ambit of the mandate expressed in the ordinance voided in *Carbone*.

With respect to disposal, petitioners omit to advise this Court that in 1984 the Town solicited more than 69 companies from 18 states and Canada to bid pursuant to General Municipal Law § 120-w to construct and operate the incinerator. The successful bidder was Ogden Martin Systems of Babylon, Inc., a New Jersey corporation with a Delaware parent. Since 1985 the Town, the Babylon Industrial Development Agency and Ogden

[7] Similarly, petitioners improperly refer to a proposed contract that is not in this record (Petition at 4, n.2) and which, in any event, is without any evidentiary value because it was not adopted. Accordingly, petitioners' reference is improper procedurally and factually.

Martin have proceeded on agreements to build and operate the incinerator.[8]

Given the ten years which passed between the Town's competitive bidding acquisition of the disposal facility and the competitive bidding for the collection of commercial solid waste, it is difficult to fathom petitioners' argument that the Second Circuit erred in analyzing the disposal aspect of Babylon's commercial district distinct from the collection aspect.[9]

Petitioners' reliance on *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994), is misplaced. Contrary to petitioners' claim that the Second Circuit ignored the teaching of *West Lynn Creamery*, (Petition at 11), the Second Circuit addressed it directly and concluded that the analogy to *West Lynn Creamery* was unpersuasive. 66 F.3d at 1288. The Second Circuit was correct in its analysis because in *West Lynn Creamery*, Massachusetts was taxing a private out-of-state group (milk producers) to subsidize another private group (in-state dairy farmers). In significant contrast here, only in-town parties (the commercial property owners) are taxed and the funds are used to pay (not subsidize) a public facility built by municipal bonds on Town land.

Nor does petitioners' contention that the Second Circuit undertook a prohibited component-by-component view of the Babylon system hold water. The Second Circuit specifically looked at the cumulative effect and distinguished *West Lynn Creamery*, stating that unlike the

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[8] The Town owns the land where the incinerator is located, the Town leases the realty to the Town IDA which subleases it to Ogden. The Town IDA issued bonds which paid for the construction of the incinerator and the Town is unconditionally obligated to pay debt service on the bonds.

[9] In the district court the respondents' asserted the defenses of statute of limitations and laches to petitioners' challenge to the Town's already ten-year-old agreement to acquire solid waste disposal services. The merits of these defenses were not reached below and are themselves reason for denial of *certiorari* here.

Massachusetts milk scheme, Babylon's financing system does not:

> "subsidize" BSSCI or Ogden. Instead, the Town spends its tax revenues to *purchase* services for Town residents—a traditional, and unexceptionable, municipal activity. Babylon buys garbage collection services from BSSCI and incinerating services from Ogden.

66 F.3d at 1292. Furthermore, as discussed below, this Court has not prohibited an analysis by component in the market participation cases.

In sum, the Town of Babylon has followed the precepts set down by this Court in *Carbone*. Both the Second and Third Circuits have analyzed the varying fact-specific systems challenged and ruled in a fashion consistent with this Court's teaching in *Carbone* and this Court's interstate commerce jurisprudence. Consequently, no purpose would be served by granting a writ of *certiorari* in this case.

II. NO FURTHER DIRECTION FROM THIS COURT IS NEEDED REGARDING THE MARKET PARTICIPANT DOCTRINE

Consistent with what this Court has held, the Second Circuit "decid[ed] whether each component of Babylon's waste management system constitutes 'regulation' of commerce and, if so, whether such regulation violates the Commerce Clause." 66 F.3d at 1282. The Second Circuit considered separately: (i) the Town's creation of the Commercial Garbage District; (ii) the Town's relationship with its contractor for collection services, BSSCI; and (iii) the Town's relationship with its contractor for disposal services, Ogden Martin. As to the first component, the Second Circuit found that the Town acted as a market regulator when it created the Commercial Garbage District, but that the District did not violate the dormant Commerce Clause. As to the second and

third components, the Second Circuit found that the Town is a participant in both the solid waste collection market and the solid waste disposal market, and therefore exempt from Commerce Clause scrutiny. Petitioners disagree with the Second Circuit's analysis and seek "clarification" by this Court of the market participant doctrine.

The limits of the market participant doctrine have been clearly defined by this Court on at least four occasions in the past twenty years and need not be revisited. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (State a participant in scrap market and therefore not subject to the dormant Commerce Clause even though State statute made it more lucrative to dispose of cars in-state); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (State a participant in the cement market and therefore could confine the sale of cement to residents of the State); *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983) (City a market participant in construction projects funded by City funds and therefore could require project workforce to be at least half City residents); *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) (State a participant in timber sales market but not a participant in the timber processing market and therefore could not contractually require the purchaser of its timber to process it in-state).

Notwithstanding petitioners' claims of purported uncertainty surrounding the market participant doctrine, this Court has refused the opportunity to address the market participant doctrine on at least seven occasions, most recently in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, —— U.S. —— (February 20, 1996).[10]

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[10] *See also, Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 909-12 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991); *Swin Resources Sys., Inc. v. Lycoming County*, 883 F.2d 245, 248-51 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990); *Shell Oil Co.*

In addition, the lower courts have applied the market participant doctrine consistently. Petitioners mistake as confusion, the necessarily fact sensitive inquiry attendant to application of the market participant doctrine. To apply this doctrine, a court must in the first instance, identify the market in which the State or local government purportedly participates and whether the conditions sought to be imposed extend beyond that market. *See Wunnicke*, 467 U.S. at 97. While the lower courts may struggle with the particular facts of each case, they are doing so within the parameters of the market participant doctrine and not "on an ad hoc basis" as petitioners assert. Petition at 18.

The market participant doctrine was first adopted under the premise that "[n]othing in the purposes animating the Commerce Clause prohibits a State in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others". *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). This Court in *Hughes* held that the State of Maryland had entered the market for scrap metal as a purchaser by offering a bounty paid from State funds for the destruction of abandoned cars directly to scrap purchasers, and could constitutionally impose conditions on such purchase which proved to be more burdensome to out-of-state processors. *Id.* at 799. There was a strong dissent by Justice Brennan.

In the case at bar, petitioners attempt to resurrect arguments raised in Justice Brennan's dissent. In *Hughes*, Justice Brennan stated:

> [t]he only questions respecting the Commerce Clause concern the issue of whether Maryland may in effect

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v. City of Santa Monica, 830 F.2d 1052, 1056-58 (9th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Smith v. Georgia Dept. of Agriculture*, 630 F.2d 1081, 1083 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981).

> require that the processing of such scrap . . . be restricted to processors located within the State in light of the asserted governmental objectives in so doing and the consequent effect upon interstate commerce.

426 U.S. at 819 (Brennan, J., dissenting). Petitioners seek to categorize this case as a processing case which is subject to scrutiny under the Commerce Clause and consequently also subject to *Carbone*. Like this Court in *Hughes*, the Second Circuit here rejected this argument concluding that "[i]n Babylon, local businesses do not buy services from anyone. Instead, the Town unilaterally provides garbage services to everyone in the District." 66 F.3d at 1283.

Petitioners also implore this Court, as did Justice Brennan's dissent, to consider the "design and effect" of the Town's waste management system, even if each component of the system is valid.[11] The majority in *Hughes* rejected this argument, 426 U.S. at 806, and so did the Second Circuit here. 66 F.3d at 1282. In *Hughes*, the Court held that Maryland was a market participant and not a market regulator even though the effect of Maryland's bounty program was to compel suppliers of hulks to sell only to local scrap processors because the bounty caused the sale price to be higher than could be obtained by selling to out-of-State scrap processors.

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[11] In *Hughes*, Justice Brennan acknowledged that when a State restricts its purchases for its own use to items produced, manufactured or processed within its boundaries, "it does not affect the total flow of interstate commerce, but rather precludes only that quantum that would otherwise occur if the State were to behave as a private and disinterested purchaser." 426 U.S. at 820 (Brennan, J., dissenting). Nevertheless, Justice Brennan criticized this Court's refusal to look beyond the State's participation in the market to its "aim and effect" which, according to Justice Brennan, "establish[ed] an economic barrier against competition with the products of another State or the labor of its residents." *Id.* at 820 & 824.

This "design and effect" argument was similarly rejected by this Court in subsequent cases. In *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), this Court upheld South Dakota's policy to confine sales of cement by a State funded plant to residents of the State, even though the effect was to bar out-of-state residents from purchasing cement which was in limited supply. Similarly, in *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983), this Court upheld a Boston city order requiring that any construction project funded by city funds be performed by a work force consisting of at least fifty percent city residents, even though the effect was to preclude certain construction firms which employed out-of-state residents from participating in these projects.

Moreover, petitioners conveniently avoid any substantive discussion of the fourth Supreme Court decision to reject the "design and effect" argument in the context of the market participant doctrine, *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). In *Wunnicke*, this Court clarified in unmistakable terms the limits on a state or local government's ability to impose restrictions on a market in which it purportedly participates.

> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce *within the market in which it is a participant*, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.

Id. at 97-98 (emphasis added).

Thus, even assuming that prior to *Wunnicke* the scope of the market participant doctrine was unclear, this Court

in *Wunnicke* made clear that the heart of the dispute is the definition of the market in which the State participates. It is patent that the "fundamental issues regarding the limits of the market participant doctrine" which petitioners assert need to be addressed now, (Petition at 17), were addressed by this Court almost twelve years ago.

In direct contrast to petitioners' position that the "design and effect" of the action controls, this Court distinguished and considered separately for purposes of applying the market participant doctrine, each activity in which the State was involved in *Wunnicke*. The State's authority to impose processing restrictions under the market participant doctrine depended on whether Alaska participated in the timber processing market or just the timber sales market. 467 U.S. at 98. The Court found that the State's proprietary interest in the timber ceased once it was sold. It was only after finding that the State was not a participant in the timber processing market, but only the timber sales market, that this Court held that the State of Alaksa could not impose restrictions on the processing market under the guise of the market participant doctrine. *Id.* at 99.

In the case at bar, the Second Circuit fully considered and correctly decided the issues in accordance with the limitations of the market participant doctrine established by this Court. Rather than look at the total effect of the Town's waste management system, as petitioners urge, the Second Circuit was careful to distinguish each component of the system, including the Town's decision to replace the private market for commercial garbage collection with a uniform municipal collection system, as required under *Wunnicke*. 66 F.3d at 1282.

Petitioners misstate the Second Circuit's opinion by asserting that the Second Circuit applied the market participant doctrine to the Town's creation of the Commercial Garbage District. Petition at 19-20. However, the

Second Circuit found the Town's creation of the Commercial Garbage District to be outside the limits of the market participant doctrine, because it constituted regulation of a market, not participation in it. 66 F.3d at 1282. Having determined that the Town's taking control over the collection duties in the garbage market does not discriminate against interstate commerce, the Second Circuit correctly applied the *Pike* balancing test and held that the Town's waste collection system did not impose incidental burdens on interstate commerce that are excessive in relation to the local benefits. *Id.* at 1286-88. Thus, petitioners' assertion that the Second Circuit has impermissibly expanded the market participant doctrine by applying it to the Town's elimination of the commercial garbage collection market is without merit.

The Second Circuit was equally careful in analyzing the remaining components of the Town's waste management system under the market participant doctrine and petitioners do not directly attack these findings.

Finally, petitioners assert no conflicting decisions which would warrant review of this case. The Second Circuit's decision is consistent with the market participant doctrine established by this Court and therefore, there is no reason for this Court to grant a writ of *certiorari*.

III. THERE IS NO NEED FOR THIS COURT TO DETERMINE WHETHER AN ALLEGED DEPRIVATION OF A CONSTITUTIONAL RIGHT CONSTITUTES IRREPARABLE INJURY

The Second Circuit upheld the District Court's explicit finding that petitioners have not demonstrated irreparable harm. It concluded that "[b]ecause the record supports the district court's determination that plaintiffs' alleged injuries would be entirely financial—and therefore remediable by an award of money damages—we cannot say that the district court clearly erred when it

found that the plaintiffs had not demonstrated irreparable harm." 66 F.3d at 1295.

Petitioners ask this Court to establish a bright line as to whether an alleged deprivation of a constitutional right constitutes irreparable harm for purposes of obtaining a preliminary injunction. Petition at 20-24. This Court, however, has already refused to grant injunctive relief where First Amendment rights were at issue. *See Socialist Workers Party v. Attorney General of U.S.*, 419 U.S. 1314, 1318 (1974).

In *Socialist Workers Party*, the applicants sought to enjoin the FBI from attending or otherwise monitoring a national convention of the youth organization of the Socialist Workers Party ("YSA"), which was open to the public. YSA claimed that the FBI's activities would have a "chilling effect" on their First Amendment rights. The Supreme Court upheld the Second Circuit's denial of injunctive relief on finding that "governmental investigative authority cannot be permitted to lead to an indiscriminate willingness to enjoin undercover investigation of any nature, whenever a countervailing First Amendment claim is raised." 419 U.S. at 1319. Thus, the Supreme Court has already decided that deprivation of a constitutional right does not automatically constitute irreparable injury.

Petitioners misstate the law by asserting that there is a conflict among the lower courts on this issue. Petition at 20-21. Petitioners, however, fail to consider that irreparable harm is a factual issue within the discretion of the trial court, and cannot be subject to the bright line test which they now seek. *See, e.g., Socialist Workers Party*, 419 U.S. at 1318 (Supreme Court noted with approval that the Court of Appeals had "analyzed the competing interests at some length"); *Hohe v. Casey*, 868 F.2d 69 (3d Cir.), *cert. denied*, 493 U.S. 848 (1989) (assertion of First Amendment right does not automatically require finding of irreparable injury).

It is well established that a preliminary injunction is never granted as a matter of right and is within the sole discretion of the trial court. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *Eli Lilly & Co. v. Premo Pharmaceutical Laboratories, Inc.*, 630 F.2d 120, 136 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980). A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. *See Romm Art Creations Ltd. v. Simcha Int'l. Inc.*, 786 F. Supp. 1126, 1132 (E.D.N.Y. 1992). The conclusion that an injury is irreparable involves considerations of preserving the status quo, whether an adequate remedy at law exists, public policies and interests, and the possibility of harm to other interested persons. *See Eli Lilly & Co.*, 630 F.2d at 136.

Petitioners, however, oversimplify the holdings of those cases on which they rely, and avoid any discussion of the facts in order to create the illusion of a conflict among the lower courts. Likewise, petitioners fail to address the explicit finding by the District Court in the case at bar that petitioners' injuries would be entirely financial and therefore not irreparable.[12] Pet. App. at 49a, 51a. As the Honorable Thomas C. Platt recognized in the district court, the facts of this case are clearly distinguishable from those where fundamental freedoms, such as the First

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[12] In the case at bar the District Court stated:

> In any event, I understand what the parties have expounded to me, namely, the plaintiffs say that they will suffer irreparable harm by virtue of the fact that 75 or 90 percent of lost profits on behalf of one or more of the plaintiffs, but there is a — there is no irreparable harm in the totally destructive sense, and it is a question of monetary damages.
>
> And while, in the case of First Amendment constitutional violations, there is very rarely a case that you could be made whole by monetary damages, in a case of this kind I think the likelihood of not being able to be compensated for monetary damages is probably pretty thin.

Pet. App. at 49a.

Amendment, are at issue. *Id.* at 49a. *See also, Elrod v. Burns*, 427 U.S. 347, 373 (1976) (injunctive relief granted where First Amendment interests were threatened or being impaired); *Grand Central Sanitation, Inc. v. City of Bethlehem*, 1994 U.S. Dist. LEXIS 15825, *6 (E.D. Pa. 1994) (court declined to find alleged violation of commerce clause to be *per se* irreparable injury and distinguished First Amendment violations).

Petitioners' analysis is therefore faulty and they have failed to raise a valid issue worthy of this Court's review.

CONCLUSION

This Court should deny a writ of certiorari on all issues raised in the Petition.

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